Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39726
Docket No. MW-38620
09-3-NRAB-00003-040635
(04-3-635)

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Texas Mexican Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned outside forces (Alpha Pile) to perform Maintenance of Way and Structures Department work (driving pile, removing timber piles, caps, stringers, head walls, installing steel girths and related bridge maintenance work) on bridges in the vicinity of Mile Posts 90.00, 89.00, and 89.73 between Benavides, Texas and Realitos, Texas beginning March 16, 2004 and continuing. (System File EPTM-04-20/286).

(2) The Agreement was further violated when the Carrier failed to furnish the General Chairman with a notice of its intent to contract out the work in question and failed to exert a good-faith effort to increase the use of Maintenance of Way forces and reduce the incidence of employing outside forces pursuant to Rule 29 and the December 11, 1981 Letter of Agreement.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants L. Serna, J. Garcia, V. Monvivais, A. Jiminez, N. Saenz, and A. Andrade shall now each be compensated for three hundred twelve (312) hours pay at their respective straight time rates of pay and one hundred seven (107)

hours pay at their respective time and one half rates of pay, for the hours expended during the period beginning March 16, 2004 and the Claimants shall be compensated at their applicable rate of pay for an equal portion of all man-hours expended by the outside forces in the performance of the aforesaid work beginning May 29, 2004 and continuing."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization protested subcontractors performing bridge repair work at the three locations cited in the Statement of Claim as part of the extensive upgrading of the Carrier's main line and bridges. This extensive project was the result of the Carrier obtaining millions of dollars in funding for the upgrade project.

The Organization maintains that (1) the instant work of performing bridge repairs was clearly work of the Claimants (2) the Carrier did not conduct good faith discussions with the Organization about contracting out and(3) the Claimants were willing and able to perform the work, but the Carrier did not give them a good faith opportunity to have the work assigned to them. By reducing the workforce by more than 50 percent, the Carrier has not operated in good faith and now seeks to avoid having Organization members perform scope covered work through subcontracting. The Organization claims that the Carrier was obligated to supplement its workforce to meet its responsibilities.

The Carrier responds that the bridge repairs at issue did not violate the Agreement because (1) the work is not covered by the Scope Rule (2) the scope and urgency of the entire project met the requirements of Rule 29 for contracting (3) the Carrier engaged in the notice and conferencing process as required under Rule 29 and (4) stare decisis requires the instant claims to be denied. The record shows that the Carrier's stated reasons for subcontracting the upgrading work pertained to the lack of sufficient manpower, as well as special tools and equipment that were required for the work to be completed in a timely manner. The Organization cannot show that the work of this extensive nature was customarily or historically performed by Organization represented employees. Moreover, BMWE-represented employees were not adversely affected by this subcontracting because they were fully employed.

The Board carefully reviewed the evidence and finds that the Organization failed to prove a violation of the Agreement in this case. The work at the above bridges at Mile Posts 89.00, 89.73, and 90.00 is similar to the work addressed in Third Division Award 37009. That Award dealt with an earlier phase of the extensive upgrading project on the Carrier's line. Here, the Carrier served the Organization with a subcontracting notice on April 23, 2003. The Organization replied on April 29, claiming the notice was vague. The Carrier provided additional information in a letter served April 29, 2003. This letter included the five bridges to be repaired. The parties conferenced the Carrier's notice on May 8, 2003 and no understanding was reached. While Award 37009 dealt with an earlier phase of the upgrade project, the Carrier's rationale for subcontracting was the same.

As the Board found in Third Division Award 37009, we so find here because the Organization failed to prove that (1) work of this extensive nature was reserved to Organization-represented employees under the Scope Rule (2) the work had been historically and customarily performed by them as opposed to contractors, or that (3) Rule 29 precluded the Carrier from contracting out work on this extensive upgrade project.

Because the Carrier complied with the notice and conferencing requirements and supported its reasons for contracting the bridge work at Mile Posts 89.00, 89.73, and 90.00, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of June 2009.